

IN THE SOLOMON ISLANDS COURT OF APPEAL

Case name: Eagon Pacific Plantation Ltd v Haro

Citation: 11 May 2018

Decision date:

Nature of Jurisdiction Appeal from Judgment of The Court of Solomon Islands

Court File Number(s): 9047 of 2017

Parties: Eagon Pacific Plantation Limited v Peni Haro, Arnold Siuta Pitu, John Kilatu, Lemick Bile, Arnold Minu, Harry Finau, Kelrick Roy, Masuru Vudere, Trading as Kalena Foundation Resources Development, Gallego Resources Limited, Jaya Bejaya Limited

Hearing date(s): 3 May 2018

Place of delivery:

Judge(s): Goldsbrough P, Hansen JA, Young JA

Representation: J. Sullivan QC, S. Lepe for Appellant
R. Tovosis for first and Second Respondent
No Appearance for third Respondent

Catchwords:

Words and phrases:

Legislation cited: Land and Titles Act, Forest Resources and Timber Utilisation Act

Cases cited: Eagon Pacific Plantation Limited v Siuta
American Cyanamid Company v Ethicon Limited

ExTempore/Reserved: Reserved

Allowed/Dismissed: Allowed

Pages: 1-6

JUDGMENT OF THE COURT

1. This is an appeal against the decision of Brown J dated 30 November 2017 dismissing the appellant's application for an interim injunction.
2. The appellant immediately appealed, and on 11 December 2017 filed an application before a single Judge of this Court for an injunction in similar terms to the application. This was granted by the Chief Justice sitting as a single Judge of this Court on 15 December 2017.

Background

3. The claim itself is relatively straightforward. It seeks injunctive relief, accounts, damages for both trespass and conversion, and exemplary damages. It arises from an allegation that the respondents entered and logged the appellant's land thereby committing trespass.
4. In 1964 the Commissioner of Crown Lands purchased the perpetual estate of the subject land in New Georgia from the customary owners. The initial plan of the purchased land was challenged by a Nathan Kera. The Adjudication Officer, A.V. Hughes, recognised an error and corrected it in his decision of 24 April 1965. (AR121). As a consequence a corrected map was created dated 13 June 1965. (Helpfully, the appellant provided us at the hearing with A3-sized copies of relevant maps that are at AR 35, 36 and 37. 35 and 36 are of particular relevance to this appeal and are attached to this judgment as Annexures 1 and 2. Annexure 1 is a coloured map of the whole area provided by the appellant and showing the boundaries of his land. Annexure 2(refer to map, Annexure 2) is the original corrected 1965 map deposited in the registry. We commend this practice.)
5. In 1996 the appellant entered into an agreement with the Commissioner of Crown Lands to take a fixed term estate of the land for 75 years. This was registered on 29 April 1996 as parcel 122-001-04. The premium for the grant was SI\$23 million.
6. Notwithstanding that this is registered land, attracting the indefeasibility provisions of the Land and Titles Act, there have been numerous challenges to the ownership of the land over the years. Unfortunately, this is yet another proceeding regarding the land.
7. It is common ground that the first respondents, their trading entity and the tribe they represent are the owners of Lot 9 and Lot 12 on the map annexure 2(refer to annexure 2 on the map)
8. The apex of the appellant's land in the top centre of Annexure 2(refer to Annexure 2 on the map) and is shown as datum point KO. There is then a boundary line running at a slight angle from that point to the south-west where, at a point just below the contour line number 129 on annexure 1(refer to Annexure 1 on the map), the line turns sharply to the west. It is the crossing of the boundary between the apex and the corner below 129 by the respondents that is the subject of these proceedings.
9. The first respondents obtained a Form B Forest Resources and Timber Utilisation Act Felling Licence, which was granted on 15 January 2013 (AR50-51). The term of the licence is for three years. It is limited to the land known as Lots 9 and 12 (which are shown on Annexure 2) of Kalena customary land, New Georgia. Lot 12 is immediately to the west of the affected boundary described above, and Lot 9 is further to the west, bordering Kalena Bay. It is apparent that any logging outside of Lots 9 and 12 would be illegal.
10. It seems relatively clear that the respondents extended their logging activity across the boundary into the appellant's land along parts of the boundary mentioned above. They apparently did this on the basis that their customary land was part of the registered land of the appellant and that somehow this defeated the indefeasibility of the appellant's land.
11. It is the respondents' position that the original 1965 grant, which was registered as perpetual estate in the name of the Commissioner, was wrongly drawn. They maintain that a triangle of land at the apex of the appellant's registered land is Kalena customary land. This triangle is said to be formed the two sides of the boundary mentioned above from KO to

contour 129, and part of the boundary drawn from KO 80 to a point between the numbers grid numbers 68 and 69 on the right-hand side of annexure 1, beside the notation Mt Mahimba. The bottom of this triangle is said to be a line from the corner below 129 on annexure 1 (refer to Annexure 1 map), straight across to Mt Kokonga in a north easterly direction. It is clear that this line to Mt Kokonga goes over the north-eastern boundary of the appellant's land to reach the mountain top. Essentially, the respondents' position is that as they maintain it is customary land, notwithstanding it is part of registered land under the Land and Titles Act, and, therefore, they were not trespassing when they logged over the boundary. (To make this clear Annexure 3 is a further copy of annexure 1 with a dotted line showing the triangle the respondents' claim is customary land).

The decision below

12. The Judge recorded that at first look this was an application where a claimant may succeed since the boundary of the land has shown to have been breached by the respondents. He then referred to an associated High Court case 87/2013 involving the same registered land. (The parties being the appellant and Omex Ltd). In that case he made a direction to the Surveyor General to conduct a survey to assist the court. We will return to that direction, which he states in the decision appealed from "tends to show [sic] the Western boundary of the registered land has been recorded in error, as has the northern boundary."

13. At AR 79 is the plan produced by the Surveyor General, purportedly in compliance with the judge's order. The judge recorded in his judgment that counsel for the appellant had not seen the survey map and would need to take instructions.

14. He goes on to say that the statement of a Mr Moon, in support of the application for interim injunction, makes no mention of these earlier proceedings involving Eagon. He continued:

I am on balance disinclined to grant the injunction at this time, for it may become nugatory if subsequently show [sic] that the survey of the registered land originally was an error that the boundaries [sic] of the land had been incorrectly drawn.

15. He gave the respondents 28 days to file a defence, and continued:

this is a claim where damages may suffice, since logging has and will continue to take place. Since damages are an adequate remedy I refuse the interlocutory injunctive order.

16. We note also that he followed this with the comment:

The cost of today will be reserved. The respondents shall accept the survey boundaries shown by that map produced by Mr Tovosia in Court today, for continuing breach of boundaries of the newly delineated registered land after this time may result in punitive damages in the discretion of the applicant.

17. Finally he concluded;

Any claim to be filed within 21 days. On the application itself I was satisfied a cause of action was apparent on the basis of the old boundaries, hence (sic) was considered.

Decision

18. We are not sure of the relevance as to whether or not Mr Moon in his sworn statement mentioned the earlier proceedings. But if it is of relevance, the Judge was simply wrong. Annexed to Mr Moon's affidavit Annexure BM-1: at page 93 is a letter dated 27 July 2017, to the Commissioner of Forests. That exhibit was before the judge. It clearly sets out the existence of the proceedings 87/2013 and the order made by the judge in his direction to the Surveyor General. We can only assume that the Judge overlooked this letter.

19. What was directed in 87/2013 was:

The Surveyor General allocate time and as a responsible officer, to sit down with Eagon Pacific Plantation Limited to seek to map out the particular boundaries believed to be, by the respective parties, the actual boundaries affecting

their interest in these proceedings and also to mark out on that map, the boundaries of the registered land, so that the Court and the parties have a clear view of the areas in dispute. The map will not be determinative of the issues in dispute but will assist the court when dealing with the issues.

I direct that the map and any other material be filed 7 clear days before 7th November 2016 at 3pm when the claim will come back to Pre Trial Conference for a date for hearing to be fixed.

20. That report is dated 27 November 2017, and states;

This survey request was received on the 18th of September 2017 to the office of the Commission of Lands following the High Court order as directed to the Registrar of Titles to determine the correct position of Mt Kokonga, and thus the Registrar of Title determined that KO is not located at Mt Kokonga but should be located at the hill of Mt Kokonga.

This case came about due to irregularity found in the deed registration and the actual survey carried out initially, this is with regards to names of site mentioned and where the boundary marks placed on the ground at that time. There is attached a map that follows the dotted line referred to earlier from point 129 to Mt Kokonga, but it also then carries a further line from the top of that to the datum point KO.

21. It can be seen immediately that what was addressed by the Surveyor General's office was not what was directed by the judge. The appellant was not involved in the process at all, and it is unclear from the report if any party to the proceedings was. Perhaps the respondents were because the report ended up in the hands of their solicitors even though the appellant had never seen a copy.

22. It is also apparent that while it purports to show a triangle of the registered land as customary, it also purports to add a significant area of land to the registered land. It does this by drawing a line from KO to Mt Kokonga and from there to the point at the SE corner of the appellants' land. This appears to be intended to add a large swath of others persons land to the appellant's registered estate. Who the owners of such land may be is unclear, and they are certainly not parties in any way to these proceedings. It has the same effect for a smaller portion of land at the top of this map in relation to the purported customary land claimed by the first respondent.

23. As noted there have been challenges to the registered land previously before the Courts that have been singularly unsuccessful. In dealing with a different part of the boundary of the registered land, Palmer CJ stated in *Eagon Pacific Plantation Limited v Siuta (Kalena Development)* [2010] SBHC 124, that:

the landowners who executed those instruments did understand what they were doing.

24. He stated as well that:

The original transfer documents cannot be faulted for they had been undertaken with such care, clarity and certainty.

25. Exactly the same piece of land is involved in this proceeding, and 87/2013 was the subject of proceedings between the appellant and Omex Limited (the same parties in 87/2013) in [2012] SBHC 61. In that case the current first respondents sought leave to be joined, which was refused. Such interlocutory decision was not appealed. At paragraph 11, Chetwynd J stated:

Leave to amend should be and is refused. This is an attempt to re-litigate all that has been argued before and found wanting. If another reason were needed to refuse the application for leave to amend, the Defendant and its supporters should be referred to section 97 of the Lands and Titles Act [Cap.133]. There is no evidence the intended cross claimants or anyone else involved in this case have taken any steps to refer the question to the Registrar of Titles. Section 97(4) seems to me to prevent this court from entertaining any action about the boundary until they do. As none of those involved in this case made any reference to that point and as there are no submissions about it; and as there are ample other reasons to refuse the application I will leave the issue there.

26. Chetwynd J's invitation to the parties to turn to s97 of the Land and Titles Act was unfortunate, to put it neutrally, as it led to 87/2013 being filed in the High Court. Omex rapidly took up Chetwynd J's invitation to approach the matter

pursuant to s97. Omex approached the registrar of Lands seeking he use his powers relating to the dispute over this land. For reasons that are hard to understand, given the provisions of the Land and Titles Act, he took also rapidly took up this invitation ultimately ruling that Annexure 2 was in error.

27. That led to the appellant issuing judicial review proceedings against the Registrar and Omex. We note that in their defence in that case Omex stated;

(5) As to paragraphs 14 and 15, the Second Defendant finds comfort in paragraph 11 of the Ruling by Justice Chetwynd delivered on 17 July 2012 whereby the Second Defendant was referred to Section 97 of the Land and Titles Act [Cap. 133].

28. S97 where relevant states

(1) Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.

29. It is clear what mischief this section is directed at. It is to determine where the actual boundary is situated when adjoining owners cannot agree on it. It is to cover such relatively minor situations such as when a survey peg cannot be found and adjoining owners cannot agree on the actual boundary. It is simply dealing with an uncertainty or dispute over the position of the boundary not the ownership of the land. It cannot be used to change the ownership of registered land. The intent of the section, and the plain words, simply allow the Registrar to confirm a boundary line not change ownership.

30. 29. If the section itself is not sufficiently clear then it is made so by s131 which reads, where relevant:

(3) Every entry or note in or on any register, the registry map or any filed plan shall, subject to sections 228 and 229, be received in all proceedings as conclusive evidence of the matter or transaction which it records.

This analysis shows that Judges should be wary of advising litigants

31. The section makes it clear that Annexure 2 (refer to map Annexure 2) and the FTE Register are conclusive proof, against the world, of the of the appellant's boundaries. They can only ever be changed pursuant to s229. S228 has no relevance here as the respondents rely on what is said to be a mistake as to boundaries in 1965. (The same mistake relied in the other cases about this land referred to above).

32. S229 reads:

(1) *Subject to subsection (2), the High Court may order rectification of the land register by directing that any registration be cancelled or amended where it is so empowered by this Act, or where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.*

(2) *The land register shall not be rectified so as to affect the title of an owner who is in possession and acquired the interest for valuable consideration, unless such owner had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.*

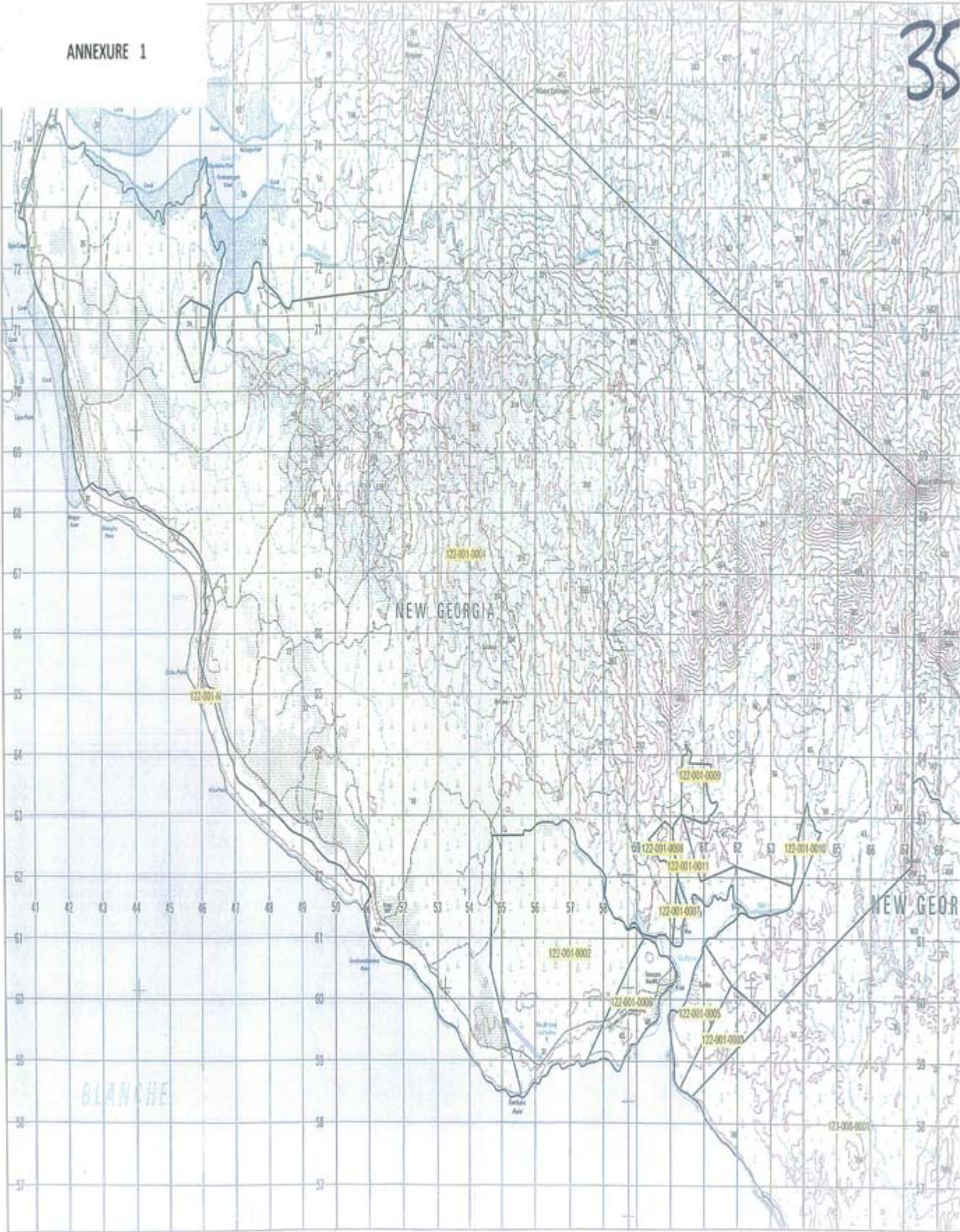
33. The reality at the present time is that the appellant is the owner of the registered land. The land involved can be traced back to 1964, and the map then prepared. This was challenged by a Mr Kera, and, as noted earlier, considered by the adjudication officer, Mr A D Hughes, who delivered his decision on 24 April 1965. Any mistake was corrected at that time.

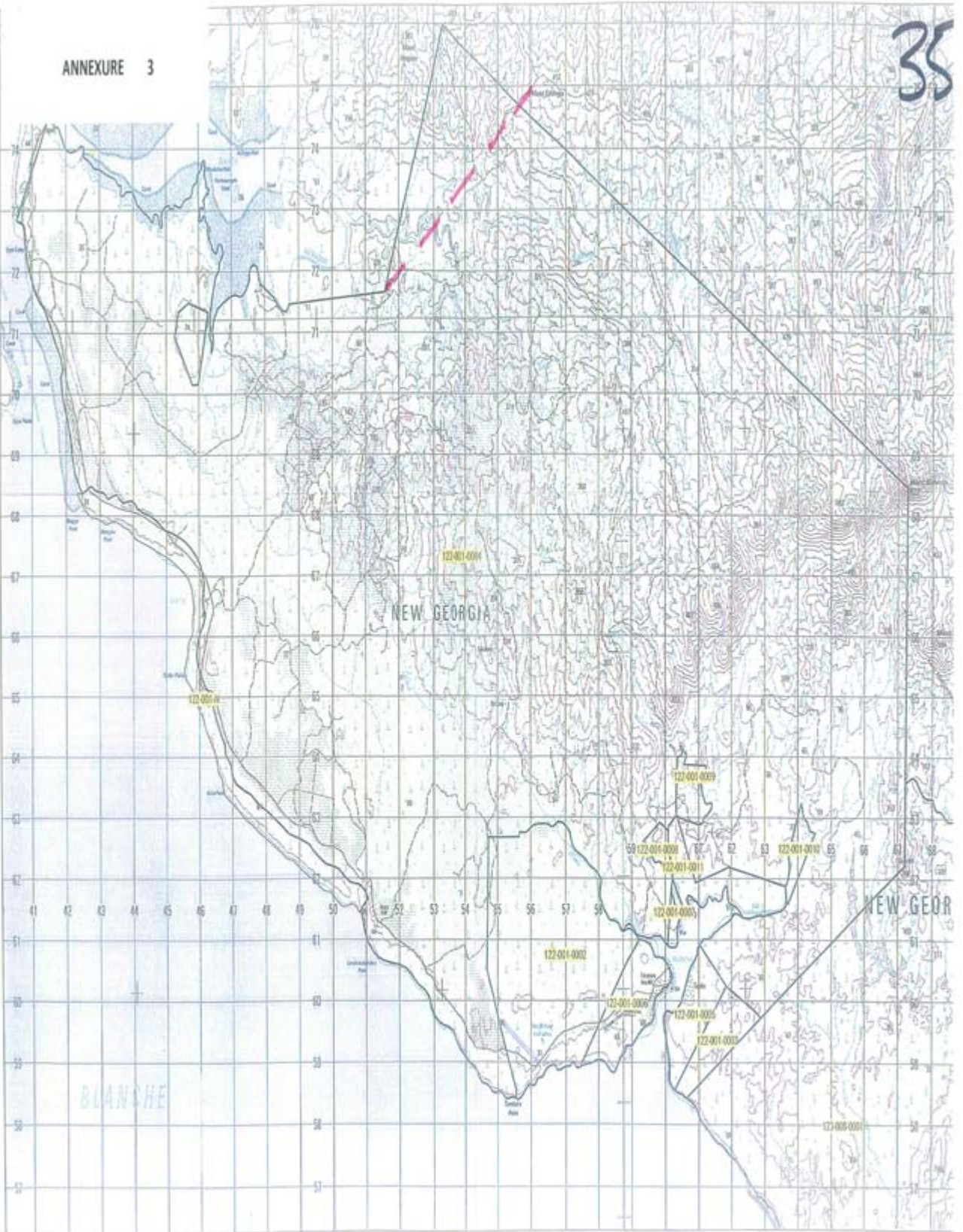
34. In that regard, the appellant is in a strong position if any application was now made by the respondents for rectification under s229. The original plan dates back now over 50 years. The land was transferred to the appellant for a term of 75 years in 1996. It was registered in the appellant's name on 29 April 1996, just over 22 years ago. There appears to be nothing in the plethora of material placed before us to suggest, even if there was a mistake in 1965 (and there is little evidence of that), that the appellant had any notice of any such mistake. Regrettably, it seems to us, that many counsel in this jurisdiction fail to properly understand s229. It is critical for counsel to grasp that in s229(2) there is a need to show a

purchaser for value “had knowledge of the omission ,fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default”. As we have said nowhere in all the material placed before us, and the High Court, does it even appear to allege that. In the absence of any such evidence there can be no basis to seek rectification for fraud or mistake under s229.

35. It appears that the judge, as with Chetwynd J before him, fell into error in regarding s97 of the Land and Titles Act as providing some basis for the change of ownership of indefeasible land. (Even though not mentioned in his decision it is clearly the section he had in mind as it was central to 87/2013 where he made his direction to the Surveyor General). There appears to be no other basis for the comments appearing in the last two paragraphs of his judgment.
36. With due respect to the Judge even accepting a misunderstanding of s97, it seems to us he went too far in his comments in the final paragraphs referred to above. The reference to “newly delineated registered land” we can only assume means he has accepted that the report of the Surveyor General somehow creates ownership changes in the Register. Not only is this wrong in law it overlooks his statement that “map will not be determinative of the issues in dispute”. The only registered land is as delineated in Annexure 2(refer to map Annexure 2) and the FTE. The Registry documents are conclusive. There can be no change of ownership of the appellant’s land, except pursuant to s229. The triangle referred to earlier can never be the first respondent’s unless they can have the title rectified under s229. In that regard, the appellant’s case in resisting any such claim is strong. Unfortunately, the whole passage could be read as an invitation to the respondents to treat the land belonging to the appellant as if it was their own. We trust that is not what was intended.
37. We also do not understand the final reference to “old boundaries”. If this is saying they have been replaced in some manner by new boundaries it is again wrong in law. There are no “old boundaries” only the boundaries set by Annexure 2(refer to map Annexure 2).
38. The comments just discussed seem to us to undermine the underlying principle of the Land and Titles Act indefeasibility. It is at the core of the Torrens System and the Land and Titles Act. In cases involving this Act counsel and judges should always have this core principle in mind.
39. We turn to apply the settled principles of whether there is a serious issue to be tried, and if so, does the balance of convenience lie in favour or against the grant of the injunction (*American Cyanamid Company v Ethicon Limited* [1975] AC 396).
40. There is strong evidence that the respondents have trespassed on to the appellant’s land. There is strong evidence that they have logged on that land. There is clearly a serious issue to be tried.
41. Equally clearly, in our view, given the strength of the appellant’s case, the balance of convenience clearly favours the grant of the injunction sought. The felling licence the respondents hold is limited to Lots 9 and 12 Annexure 2(refer to map Annexure 2), and they have no entitlement to log outside those areas. To do so is illegal even if they had a legitimate interest in the land, which they do not.
42. This is not a case where damages would not be an adequate remedy. As we note, there is a strong case they have crossed the appellant’s boundary and carried out logging activities. If proved it amounts to a trespass. In those circumstances, it is clear that damages would be an inadequate remedy.
43. Accordingly, the appeal will be allowed the injunction granted by Palmer CJ is continued on the same terms.
44. There will be costs below for the single Judge of this Court and on this appeal, to the appellant. There will be a certificate for Queen’s Counsel.

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Goldsbrough P
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Hansen JA
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Young JA





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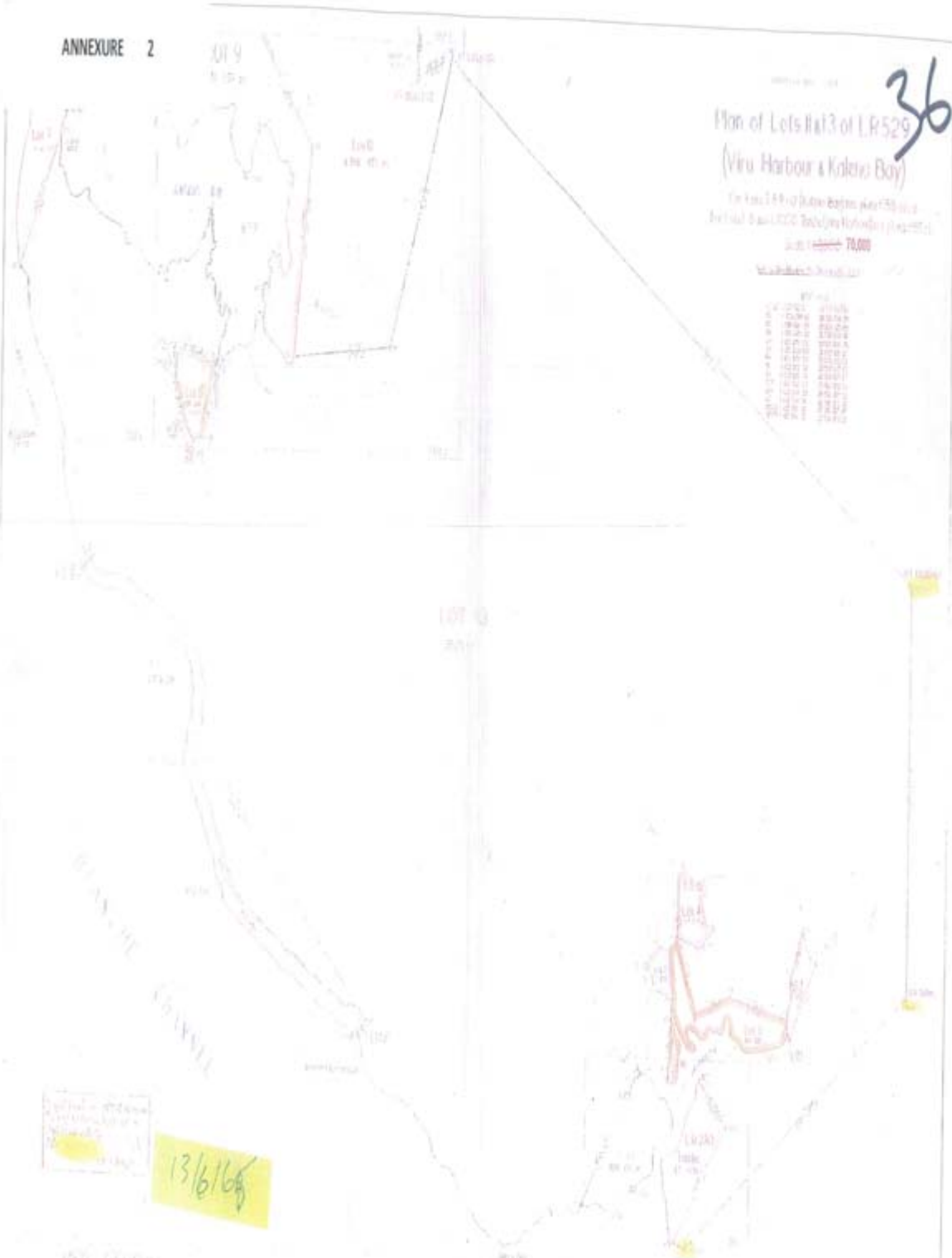
Plan of Lots 13 of LR 529 (Viu Harbour & Kales Bay)

The Lots 13 of Block 299, Plan 175/100
and Lot 13 of Block 299, Plan 175/100
are shown in red.

Scale 1:10,000

Scale of Drawing 1:10,000

Lot No.	Area (sq. m)
13/1	1,111.1
13/2	1,111.1
13/3	1,111.1
13/4	1,111.1
13/5	1,111.1
13/6	1,111.1
13/7	1,111.1
13/8	1,111.1
13/9	1,111.1
13/10	1,111.1
13/11	1,111.1
13/12	1,111.1
13/13	1,111.1
13/14	1,111.1
13/15	1,111.1
13/16	1,111.1
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13/18	1,111.1
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13/93	1,111.1
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13/95	1,111.1
13/96	1,111.1
13/97	1,111.1
13/98	1,111.1
13/99	1,111.1
13/100	1,111.1



13/6/16